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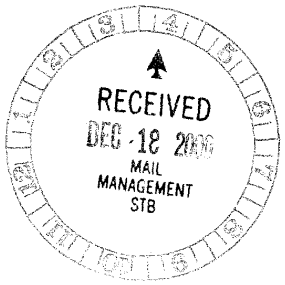
December 18, 2000



Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

Re: Ex Parte No. 582 (Sub-No. 1), Major Rail Consolidation Procedures

Dear Secretary Vernon:

Enclosed for filing is a signed original and 25 copies of the Reply Comments of National Grain and Feed Association in the above-captioned case. Also enclosed is a floppy disk in WordPerfect format containing the text of the reply comments.

ENTERED
Office of the Secretary
DEC 18 2000
Part of
Public Record

Sincerely,

Andrew P. Goldstein
Attorney for
National Grain and Feed Association

Enclosures

APG/rmm

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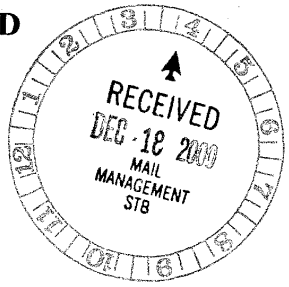
ORIGINAL

BEFORE THE

SURFACE TRANSPORTATION BOARD



EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS OF NATIONAL GRAIN AND FEED ASSOCIATION

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Dated: December 18, 2000

BEFORE THE

SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS OF NATIONAL GRAIN AND FEED ASSOCIATION

After reviewing the initial Comments of the parties in response to the Notice of Proposed Rulemaking ("NPR"), and of the Class I railroads in particular, NGFA hereby submits its Reply Comments.

Although not each railroad views the Board's proposed rules identically, and there are certain variances among the comments of the railroad industry (including the Association of American Railroads -- "AAR"), a common theme connects all of the major railroads' comments. It is that the Board should continue to examine Class I rail consolidations under the same fundamental standards that have governed rail mergers for the past 20 or more years. NGFA is not in accord with that view. This Reply touches upon a few reasons why NGFA's position differs from the railroad outlook.

I. NO "PRO-MERGER" POLICY SHOULD BE CONTINUED

Spearheaded by The Burlington Northern and Santa Fe Railway Company "BNSF"), some railroads argue that the Board is obliged to continue a "pro-merger policy" and should not "reverse the statutory presumption in favor of mergers" (e.g., BNSF Comments at 6, 29). The carrier argument is that, when enacting the Interstate Commerce Commission Termination Act ("ICCTA"), Congress knew that Class I railroads were entering a "new round of consolidation" and endorsed that goal by failing to adopt new merger standards. Ibid.

NGFA does not agree that there is a "statutory presumption in favor of mergers" or that enactment of the ICCTA bars the STB from altering the standards under which it assesses the "public interest" aspects of a rail consolidation. Section 11324 compels a balancing of various considerations to determine whether a proposed transaction is consistent with the public interest. Administrative agencies may alter their outlook toward an interpretation of the statutes they administer so long as they enunciate a reasoned basis for change. Atchison, T. S. F. Ry. Co. v. Wichita Board of Trade, 412 U.S. 800, 808 (1973); American Trucking Associations v. A. T & S. F. Ry., 387 U.S. 397, 416 (1967). Here, the Board had the benefit of scores of comments by shippers and others describing the impacts and effects of prior Class I rail mergers, as well as the benefit of its own experience and expertise monitoring the rail industry. Plainly, the Board has an appropriate basis and ample legal authority for leaving its prior policies

behind when evaluating the "public interest."

The Board's outlook toward prior mergers has essentially been that whatever is in the best interests of the applicant carriers satisfies the public interest within the meaning of Section 11324. The NPR (although wanting in specificity, as pointed out in NGFA's initial comments and those of many other shippers) suggests that the "public interest" now must provide benefits to rail customers as well as rail applicants. If the Board concludes, as some railroads urge, that it is not at liberty to find that a merger must provide direct benefits to parties in addition to the applicants, then there is something sorely amiss with the statute and the Board should waste no time in asking Congress to take corrective action.

II. THE PROPOSED RULES CONTAIN NO PRESUMPTIONS AGAINST MERGERS

Contrary to the assertions of the railroad industry, the Board's unwillingness to guarantee continuation of its pro-merger policy of the past does not constitute a new presumption against further rail mergers. The NPR states the situation as the Board sees it, based upon the record. The comments of numerous shippers and shipper organizations in response to the Advance Notice of Proposed Rulemaking ("ANPR") in this proceeding, as well as the initial comments of NGFA and other shipper representatives filed on November 17, 2000, describe mergers as producing few, if any, palpable benefits for shippers and many distinct problems, such as

service interruptions, slow-downs, and unreliability, as well as the realignment of market opportunities to suit the operating convenience and revenue streams of the carriers rather than the needs of their customers.

The NPR is a rational response to the post-merger environment which the record describes. Four of the five most recent major rail consolidations (Burlington Northern-Santa Fe, Union Pacific-Southern Pacific, CSX-Conrail, and Norfolk Southern-Conrail) have generated varying levels of service impedimenta. That the NPR requires applicant railroads to propose countervailing measures is not a presumption against mergers, but an acknowledgement of reality and a reflection of the balancing requirements in Section 11324. If merger applicants are confident that their transaction will be responsible for no similar mishaps, then they need not harbor apprehensions regarding a mechanism for redress of post-merger service injuries. On the other hand, if the proposed merger cannot be demonstrated to be above the possibility of such events, the negative impacts of merger-related service failures indeed should be weighed in evaluating the merger, and appropriate procedures to redress merger-related harm should be put in place if the merger is approved.[1]

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[1] Some carriers (e.g., BNSF Comments at 12; Norfolk Southern Comments at 25) attempt to distinguish those prior mergers which have caused service problems from any possible combinations of Class I railroads in the future, relying principally upon a supposed distinction between overlapping consolidations (the past) and end-to-end consolidations (the future). It does not, however, require an overlapping consolidation to produce service disruptions. Efforts to integrate computer systems can go awry, as they

Similarly, those provisions of the NPR requiring a demonstration of "enhanced competition" do not bespeak a presumption against mergers, but are another reflection of the Board's appropriate determination that Class I rail consolidations henceforth must benefit rail users in addition to rail applicants.[2]

III. APPLICANT RAILROADS SHOULD BE HELD ACCOUNTABLE FOR THEIR ACTIONS

The major railroads oppose all aspects of the NPR which might force carriers to be more accountable to their customers for service failures or which reserve any form of Board jurisdiction to correct conditions which result from a carrier's failure to realize

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notoriously did when Norfolk Southern acquired Conrail trackage, and work force integration similarly can be troublesome in an end-to-end transaction. In any event, it is difficult to understand how these carrier arguments are availing, since the fewer opportunities a transaction presents for system and work force integration, the fewer opportunities it offers for operating efficiencies.

[2] As noted in its initial comments, NGFA believes that the required showing of "enhanced competition" should be subjected to more definite criteria than contained in the NPR. NGFA strongly opposes the suggestion of several railroads and AAR that the "enhanced competition" requirement is met whenever a transaction places the applicant in a better position to compete with trucks or barges. The concept of "enhanced competition" should mean a form of competition that directly benefits customers of the applicant railroads. The railroads take the position that virtually any consolidation inherently enhances competition by opening up new markets. See, for example, AAR Comments at 4. That assumption is accurate only if the merging carriers presently refuse their on-line customers access to off-line markets or deny off-line originations access to on-line destinations -- practices which should not be condoned in the first instance. On the other hand, if railroads are permitting their customers to compete for markets, then a merger need not and does not provide access to "new" markets.

merger benefits held out as part of the applicants' "public interest" package. The Board not only should adhere to the position that carriers must be accountable for their merger actions and inactions, but should in fact strengthen that accountability as suggested in NGFA's initial comments.

The notion that merger applicants should be accountable for both their promises and performance appropriately applies to a number of merger issues. At this time, however, NGFA wishes to address just one of those issues: accountability for service failures.

At least one carrier, BNSF, suggests that service accountability should be a matter of individual agreement between the merger applicants and their customers. NGFA has no objection to such voluntary agreements, but believes that it is inappropriate for the Board to eschew all accountability standards in favor of private agreements. At a minimum, as suggested by NGFA in its initial comments, the Board should establish procedures and standards to govern the processing and resolution of service failure claims, and should require the carriers to address those claims on their merits rather than rejecting them arbitrarily, as often has been done in the past.

In addition, the Board should carefully avoid the trap that at least one carrier, Union Pacific, appears to have set. Union Pacific proposes (Comments, Appendix A, p. 8) a precise, narrow regime for holding carriers liable for service deterioration as a result of a consolidation. Under UP's proposal, a shipper meeting

certain volume requirements would be permitted to show that a Service Measurement (measurements of transit times, cycle times, and car supply) has deteriorated by an average of 50 percent for 120 or more consecutive days, and that it has "cooperated with the carrier in efforts to restore service," before becoming eligible for compensation. Compensation then would be limited only to "increased transportation costs." In addition, the Board could grant temporary service relief. Apparently, restoration of service to the Service Measurement parameters for even a day would require the 120-day clock to recommence.

Under these standards, a shipper suffering post-merger service failures would have no remedy unless those service failures lasted for four consecutive months, and there is no explanation by UP of why shorter term damages should be excluded.[3] Foreseeable damages, other than those for substitute transportation, would be excluded, even though they are at present compensable under the Carmack Amendment. See Liability for Contaminated Covered Hopper Cars, 10 I.C.C. 2d 154 (1994).

The UP proposal is dangerous not only because it is so preposterously limited, but also because it may preempt other avenues of recompense. Once the Board utilizes its authority to approve a merger containing substantive damage rules, the provisions of Section 11321(a) may act to preempt the application of

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[3] It can be assumed that, under the damage criteria proposed by UP, its liability for the horrendous service failures that followed the UP-SP merger would have been substantially negated.

other legal standards.

The Board should not only avoid the adoption of a narrow standard of damages for merger-related injury, but should make it absolutely clear that it does not intend, by addressing these issues in any way, to preempt access to remedies that would exist in the absence of merger rules. It is totally inappropriate for shippers to be forced to pay the price for poor railroad decisions or performance, which would be the result if the Board were to adopt provisions which restrict access to the merits of compensatory legal theories, in the manner proposed by Union Pacific.

In various ways, the major railroads question what they regard as an attitude of skepticism in the NPR toward the veracity of the claimed merger benefits to arise from future transactions. If the railroad industry would like the Board and other parties to attach a presumption of truth to the representations made by merger applicants, then the railroads should have no qualms over regulations that make them accountable for their representations and performance. There should be no fear of the truth, and carriers who appear unwilling to stand behind their representations create the impression that their customers and their regulators should think twice before believing the contents of a merger application.

IV. IT IS UNNECESSARY AND INAPPROPRIATE TO SHORTEN THE PROCEDURAL SCHEDULE AS PROPOSED BY SOME CARRIERS

Section 11325 instructs the Board to complete what amount to Class I railroad mergers within 16 months from the date when notice

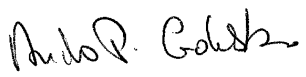
of the application is published in the Federal Register, and to allow up to 12 months from that same date for the completion of the evidentiary record. BNSF proposes to reduce the 16 months to 255 days (8.5 months), and to complete the evidentiary phase within 4.5 months after notice of the application is published. See BNSF comments at 58. Other carriers indicate acquiescence in a schedule shorter than allowed by statute, although not necessarily the schedule proposed by BNSF.

NGFA is constrained to resist the adoption of a schedule shorter than allowed by statute and generally utilized by the Board. Any future Class I mergers are likely to start what the Board and others correctly have called the "final round" of rail mergers, leading to perhaps two rail systems in North America. Before seemingly irreversible steps of that nature are taken, the Board owes it to the public to undertake a thorough examination of the facts alleged to justify further consolidations and the consequences of such steps. A meaningful examination of the complexities of a Class I consolidation transaction, including an adequate opportunity for discovery, cannot be accomplished in the short time proposed by BNSF. BNSF's truncated schedule makes sense only if one assumes that the Board's role is to rubber-stamp merger proposals, a role which NGFA does not regard as fitting.

If any particular transaction subject to the Board's merger rules for Class I railroad transactions appears to the applicants to have uniquely uncomplicated characteristics and minimal consequences, the applicants should be free to request the Board to

modify its normal procedural schedule in a suitable manner. But the Board should not start from the premise suggested by BNSF, which is that Class I mergers are to be favored and therefore should be approved in less time than allowed by statute. The outlook toward mergers that is consistent with evenhandedness is an opportunity for a full and fair hearing, which cannot be accomplished in a complicated case within the short time period advanced by BNSF, is sometimes difficult to achieve even under the procedural schedules adopted in past mergers, and should not normally be attempted in any time period lesser than provided by Congress.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on all parties of record by first class mail, postage prepaid, this 18th day of December, 2000.

Andrew P. Goldstein

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